

# Judge Rubin and the Death Penalty: Legacy Unaccomplished

David J. Bradford

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## Judge Rubin and the Death Penalty: Legacy Unaccomplished

David J. Bradford\*

There are few areas of jurisprudence which can take a finer measure of a jurist than his work in death penalty cases; the stakes are life and death and the temptation to reach results which reflect personal ideology are high. Judge Rubin's death penalty opinions are restrained and non-result-oriented. They reflect his extraordinary intellectual integrity, his overriding respect for the adversarial process, and his frustration with the constraints of Supreme Court and Fifth Circuit precedent.

Judge Rubin wrote opinions addressing sixteen different habeas corpus petitions in death penalty cases.<sup>1</sup> In three of them, he wrote a majority opinion granting relief to the condemned,<sup>2</sup> one of which was reversed *en banc* by the court of appeals.<sup>3</sup> In each of his other thirteen cases, the court denied relief to the condemned petitioner.<sup>4</sup> In three of those cases, Judge Rubin concurred in the court's judgment because he

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\* Counsel-Director for the MacArthur Justice Center in Chicago. 1976 *cum laude* graduate of the University of Chicago Law School. Clerk for Judge Rubin in 1976 through 1978.

1. The death penalty arises in federal court almost exclusively in the context of federal habeas corpus cases, in which only federal constitutional claims can be raised. 28 U.S.C. § 2254 (1988). Few federal cases have been decided under recently enacted legislation providing a federal death penalty for certain crimes. 21 U.S.C. § 848(e) (1988). See *U.S. v. Cooper*, 754 F. Supp. 617 (N.D. Ill. 1990) (upholding constitutionality of the federal statute).

2. *King v. Lynaugh*, 828 F.2d 257, reversed *en banc*, 850 F.2d 1055 (5th Cir. 1988); *Mayo v. Lynaugh*, 893 F.2d 683, modified, 920 F.2d 251 (5th Cir. 1990); *Wilson v. Butler*, 813 F.2d 669, modified, 825 F.2d 879 (5th Cir. 1987).

3. *King v. Lynaugh*, 850 F.2d 1055 (5th Cir. 1988) (*en banc*).

4. *Baldwin v. Maggio*, 715 F.2d 152 (5th Cir. 1983); *Byrne v. Butler*, 845 F.2d 501, 519 (5th Cir. 1988) (Rubin, J., concurring); *Jones v. Butler*, 864 F.2d 348 (5th Cir. 1988); *Thompson v. Lynaugh*, 821 F.2d 1054 (5th Cir. 1987); *Kirkpatrick v. Butler*, 870 F.2d 276 (5th Cir. 1989); *King v. Lynaugh*, 868 F.2d 1400, 1406 (5th Cir. 1989) (Rubin, J., concurring); *Landry v. Lynaugh*, 844 F.2d 1117 (5th Cir. 1988); *Mayo v. Lynaugh*, 882 F.2d 134, modified, 883 F.2d 358 (5th Cir. 1989), reversed, 893 F.2d 683, modified, 920 F.2d 251 (5th Cir. 1990); *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring); *Wicker v. McCotter*, 783 F.2d 487 (5th Cir. 1986); together with the cases set forth *infra* note 6.

was compelled to do so by precedent with which he disagreed;<sup>5</sup> in four others, he dissented.<sup>6</sup>

Section I of this article discusses the general constitutional framework within which Judge Rubin worked in death penalty cases. Sections II through VI focus on his opinions on five issues that were raised with some frequency in the Fifth Circuit during his tenure: (a) whether the Texas death penalty law unconstitutionally precluded the sentencer from giving effect to mitigating evidence; (b) whether counsel violated the Sixth Amendment standards for ineffective assistance at the sentencing hearing; (c) whether the jury's deliberative process was unconstitutionally infected by the misconception that the defendant would be eligible for parole if he was not sentenced to die; (d) whether the defendant was entitled to a stay of execution or further process; and (e) whether a death sentence imposed under the Louisiana death penalty law was unconstitutional when one, but not all, of the statutory aggravating factors on which it was based was invalid.

### I. THE CONSTITUTIONAL FRAMEWORK

In 1972, the United States Supreme Court held the Georgia death penalty law unconstitutional because it allowed unbridled discretion in determining who should live and who should die.<sup>7</sup> This unguided discretion resulted in the arbitrary and capricious application of the death penalty in violation of the Eighth Amendment.<sup>8</sup>

Subsequent to *Furman*, the Supreme Court upheld three state death penalty laws which limited the sentencer's discretion and prevented arbitrariness, by conditioning a death sentence upon proof of a statutory aggravating factor.<sup>9</sup> However, in two companion cases, the Supreme Court held that two state death penalty laws, which made death mandatory when certain aggravating factors were proved, had gone too far in their effort to address the constitutional concerns of *Furman*.<sup>10</sup> These statutory schemes were unconstitutional because they did not allow the jury to make an individualized sentencing decision based upon any mitigating evidence.<sup>11</sup>

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5. *Byrne*, 845 F.2d at 519; *King*, 868 F.2d at 1406; *Riles*, 799 F.2d at 955.

6. *Griffin v. Lynaugh*, 823 F.2d 856, 865 (5th Cir. 1987) (Rubin, J., dissenting); *Buxton v. Lynaugh*, 879 F.2d 140, 148 (5th Cir. 1989) (Rubin, J., dissenting); *Kirkpatrick v. Blackburn*, 777 F.2d 272, 288 (5th Cir. 1985) (Rubin, J., dissenting); *King*, 850 F.2d at 1061 (Rubin, J., dissenting).

7. *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972).

8. *Id.*

9. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950 (1976); and *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960 (1976).

10. *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S. Ct. 3001 (1976).

11. *Id.*

The decisions in *Gregg* and its companion cases established two limited constitutional principles, which provide the framework for analyzing the constitutionality of any state death penalty scheme. First, the group of defendants eligible for the death penalty must be narrowed to those cases in which the state has proved an objective statutory aggravating factor which "channel[s] the sentencer's discretion."<sup>12</sup> Second, to ensure that the sentencing decision is individualized, the sentencer may not be prevented from considering and giving effect to any mitigating circumstances regarding the defendant or his crime.<sup>13</sup>

## II. THE CONSTITUTIONALITY OF THE TEXAS DEATH PENALTY LAW

Judge Rubin wrote opinions in three cases in which the defendant complained that the Texas death penalty law unconstitutionally precluded the jury from giving effect to mitigating evidence. The decisions reflect Judge Rubin's open-minded and restrained approach to deciding constitutional issues. They also reflect that whether an attorney raises a claim in strict accordance with state procedure can determine arbitrarily who lives and who dies.

In *Jurek*,<sup>14</sup> the United States Supreme Court upheld the constitutionality of the Texas death penalty scheme against the claim that it permitted the arbitrary imposition of the death penalty. It found that Texas adequately channeled the jury's discretion by mandating death whenever the jury answered three "special issues" affirmatively.<sup>15</sup> But it upheld the Texas scheme on the premise that these statutory questions would be construed in a manner that would allow for adequate consideration of mitigating evidence.<sup>16</sup>

For a number of years the Fifth Circuit, relying on *Jurek*, routinely rejected claims that the Texas scheme did not adequately permit the jury to give effect to mitigating circumstances.<sup>17</sup> For example, in *Thompson v. Lynaugh*,<sup>18</sup> Judge Rubin found the Texas special issue instructions

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12. *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 1764 (1980).

13. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964 (1978).

14. 428 U.S. 262, 96 S. Ct. 2950 (1976).

15. The Texas special issues are: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987).

16. 428 U.S. at 272, 96 S. Ct. at 2956.

17. See e.g., *Penry v. Lynaugh*, 882 F.2d 141 (5th Cir. 1987), reversed, 492 U.S. 302, 109 S. Ct. 2934 (1989).

18. 821 F.2d 1054, 1059 (5th Cir. 1987).

had "been construed to allow a defendant to introduce, during the punishment phase of his trial, whatever mitigating evidence he can muster, thus ensuring that a death sentence is not 'wontonly or freakishly' applied." Thirteen years after *Jurek*, in *Penry v. Lynaugh*,<sup>19</sup> the Supreme Court reversed the Fifth Circuit and recognized that the Texas scheme unconstitutionally prevented the jury from giving effect to certain mitigating evidence.

In *Landry v. Lynaugh*, a case decided a year before the United States Supreme Court had granted certiorari in *Penry*, Landry raised the *Penry* claim, i.e. that the Texas "death penalty scheme does not permit the jury to give full consideration to mitigating circumstances."<sup>20</sup> Because Landry's counsel failed to object to the Texas statute on this ground at trial, the district court found the claim barred under the procedural default doctrine of *Wainwright v. Sykes*.<sup>21</sup> Landry contended that the jurisprudential novelty of his *Penry* claim should excuse his default.<sup>22</sup> Judge Rubin rejected the "novelty" argument because the Fifth Circuit had done so in *Selvage v. Lynaugh*.<sup>23</sup> Judge Rubin also found that the United States Supreme Court had left open the question of whether the Texas death penalty law allowed for adequate consideration of mitigating circumstances in its 1976 decision in *Jurek*; thus, there had been a reasonable basis to raise the claim at the time of Landry's trial in 1983.<sup>24</sup>

Within a year of his decision in *Landry*, Judge Rubin revisited the question of whether counsel's failure to raise a *Penry* claim at trial should be barred by procedural default in *King v. Lynaugh*.<sup>25</sup> By this time, the Supreme Court had granted certiorari but not yet ruled in *Penry*. The court in *King* issued a per curiam opinion concluding that it was bound by *Selvage* to find the *Penry* claim was defaulted because counsel failed to raise it at trial.

Judge Rubin exemplified his open-minded quest for accuracy and departed from his opinion in *Landry*. He wrote a concurring opinion concluding that the *Penry* claim should not be barred by procedural default. Contrary to his opinion in *Landry*, he found that prior to *Selvage*, the Fifth Circuit had decided in *Williams v. Lynaugh*<sup>26</sup> that a

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19. 492 U.S. 302, 109 S. Ct. 2934 (1989).

20. 844 F.2d 1117, 1122 (5th Cir. 1988).

21. 433 U.S. 72, 97 S. Ct. 2497 (1977).

22. See *Reed v. Ross*, 468 U.S. 1, 14-15, 104 S. Ct. 2901, 2909-10 (1984).

23. 842 F.2d 89, 94-95 (5th Cir. 1988).

24. 844 F.2d at 1122.

25. 868 F.2d 1400 (5th Cir. 1989) (*King III*) (Rubin, J., concurring). This opinion, which concurred in the denial of relief was Judge Rubin's opinion concerning Leon Rutherford King. See *infra* note 59 and accompanying text.

26. 837 F.2d 1294 (5th Cir. 1988).

*Penry* claim should not be barred by procedural default. Because *Williams* was the earliest decision on the issue, Judge Rubin concluded that the court was compelled to follow it. However, he recognized the court was also obligated to follow the court of appeals' decision in *Penry* on the merits and deny relief.

In *Mayo v. Lynaugh*,<sup>27</sup> Judge Rubin addressed the merits of the *Penry* claim, through four separate decisions. In his first opinion in *Mayo*, Judge Rubin rejected the *Penry* claim on the merits because he was still "bound by the precedents of this circuit," including *Penry* itself.<sup>28</sup>

Within days of *Mayo I*, the Supreme Court issued its decision in *Penry*, overturning the Fifth Circuit and finding that at least in some cases the Texas statute unconstitutionally precluded the jury from giving effect to mitigating evidence. The State now argued that *Mayo*, like *Landry* and *King* before him, had procedurally forfeited his *Penry* claim by failing to raise it at trial. The panel initially agreed, citing Judge Rubin's concurring opinion in *King III*.<sup>29</sup> It also concluded that even if the *Penry* claim had been preserved, *Mayo* had not explained how his jury was precluded from giving effect to mitigating evidence.<sup>30</sup>

*Mayo* filed a second rehearing petition, contending that the State had waived its procedural default defense by failing to raise it in the federal district court. Judge Rubin again demonstrated his open-minded approach even as to the correctness of his own opinions and agreed with *Mayo* that the state had waived any procedural default defense.<sup>31</sup> He also reasoned that because a *Penry* claim focused on the mitigating evidence presented at sentencing, the failure to make a contemporaneous objection did not impair the court's ability to analyze the claim in collateral proceedings.<sup>32</sup> Finally, he found the Texas special issues instruction did not provide a vehicle for the jury to consider the mitigating evidence of child abuse in *Mayo's* case.<sup>33</sup> Reflecting his never-ending quest for accuracy, Judge Rubin thereafter issued yet a fourth opinion<sup>34</sup> modifying his discussion of the mitigating evidence in *Mayo's* case.

It was only a series of fortuities—the State's failure to raise a timely procedural default defense and the timing of the Supreme Court's opinion in *Penry*—that allowed Judge Rubin to analyze the constitutional merits

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27. 882 F.2d 134, modified, 883 F.2d 358 (5th Cir. 1989), reversed, 893 F.2d 683, modified, 920 F.2d 251 (5th Cir. 1990).

28. 882 F.2d at 140-41 (*Mayo I*).

29. *King*, 868 F.2d at 1406.

30. 883 F.2d at 360 (*Mayo II*).

31. 893 F.2d at 686 (*Mayo III*).

32. *Id.* at 689-90.

33. *Id.* at 688.

34. *Mayo v. Collins*, 920 F.2d 251 (5th Cir. 1990).

in *Mayo*, but not in *Landry* and *King III*. More importantly, however, it was only because of Judge Rubin's intellectual integrity and willingness to reconsider his own post-*Penry* decision, that Mayo was afforded relief.

### III. INEFFECTIVE ASSISTANCE OF COUNSEL

Judge Rubin was renown for setting high standards of professionalism, particularly in his own courtroom. His opinions on whether counsel in death penalty cases violated the Sixth Amendment standards for effective assistance of counsel, however, do not reflect those standards. Rather, they reflect his adherence to the Supreme Court opinion in *Strickland v. Washington*<sup>35</sup> which tolerates substantial incompetence. Nonetheless, Judge Rubin's eloquent comments on the capricious effects of the *Strickland* standard are an enduring, albeit dissenting, contribution to death penalty jurisprudence.

Judge Rubin recognized that under the Supreme Court standard in *Strickland*,<sup>36</sup> "counsel is not so ineffectual . . . unless [he] made errors so egregious that he was not functioning as the 'counsel' . . . guaranteed by the Sixth Amendment . . ." <sup>37</sup> Additionally, under *Strickland*, "proof that the lawyer was ineffective requires proof not only that the lawyer bungled but also that his errors likely affected the result."<sup>38</sup>

Applying these standards, Judge Rubin rejected a number of ineffective assistance of counsel claims. In *Wicker*,<sup>39</sup> he found that counsel did not violate the *Strickland* standard even though he failed to disqualify a juror who was "not certain" he could follow the law, failed to *voir dire* on pre-trial publicity, failed to obtain proper instructions from the court, and called as defense witnesses two doctors who testified that Wicker's violent behavior would increase rather than abate.

In *Kirkpatrick v. Butler*,<sup>40</sup> he denied relief under *Strickland* because even if counsel had acted within the "wide range of professionally competent assistance," the result likely would not have been different. Judge Rubin recognized the limited standards by which a claim of ineffective assistance must be measured under *Strickland*:

In the trial of lawsuits, as in war, victory finds a thousand fathers, defeat is an orphan. It is always possible to conjecture that defense counsel could have done more . . . and that these additional efforts might have altered the result. That is not,

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35. 466 U.S. 668, 104 S. Ct. 2052 (1984).

36. *Id.*

37. *Wicker v. McCotter*, 783 F.2d 487, 494 (5th Cir. 1986).

38. *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

39. 783 F.2d at 494-97.

40. 870 F.2d 276 (5th Cir. 1989).

however, the standard under which we review counsel's conduct. Although counsel's arguments failed to persuade [they] . . . do not indicate that counsel's performance was "outside the wide range of professionally competent assistance."<sup>41</sup>

In *Riles v. McCotter*,<sup>42</sup> Judge Rubin once again found that the *Strickland* standards compelled him to concur in a judgment that counsel was not incompetent. However, his acquiescence did not preclude him from delivering an eloquent and compelling opinion:

I concur in the opinion because, as a judge of an inferior court, I am bound by the decision of the Supreme Court; and, as a judge of this court, I am bound by the law of this circuit. If I were free to do so, I would order an evidentiary hearing on the effectiveness of counsel . . . . The record, indicate[s] that, if Riles' trial counsel had been able, the jury might not have imposed the death penalty.

The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. It requires representation only by a lawyer who is not ineffective under the standards set by *Strickland v. Washington*.

Judge Rubin concluded, "accused persons who are represented by 'not-legally-ineffective' lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least a clemency of a life sentence."<sup>43</sup>

The logic of Judge Rubin's concurrence in *Riles* is undeniable. The Supreme Court standard in *Strickland* allows a person's life to be taken solely because his counsel was not effective. The result of the *Strickland* standard and of allowing counsel's procedural defaults to determine when a constitutional violation may be remedied,<sup>44</sup> produce a system in which the imposition of the death penalty is no less arbitrary than that which the Court condemned in *Furman*.

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41. 870 F.2d at 285, quoting *Strickland*, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066 (1984). In two cases, discussed in Section VI below, Judge Rubin wrote opinions in favor of remanding a claim of ineffective assistance of counsel for an evidentiary hearing in the district court. *Wilson v. Butler*, 813 F.2d 664, modified, 825 F.2d 879 (5th Cir. 1987); *Buxton v. Lynaugh*, 879 F.2d 140, 148 (5th Cir. 1989) (Rubin, J., dissenting). On both occasions, he sought to remand not because counsel was necessarily ineffective under *Strickland*, but because the district court had failed even to hear evidence on the issue.

42. 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

43. *Id.* (emphasis in original).

44. See *supra* note 33 and accompanying text.

#### IV. MISCONCEPTIONS ABOUT PAROLE: WHETHER THE JURY'S DECISION IS BASED ONLY ON AGGRAVATING AND MITIGATING FACTORS

While Judge Rubin expressed his disagreements with the *Strickland* standard in concurring opinions, he openly dissented in two Fifth Circuit decisions in which the death penalty was based upon misconception and bias. In *Kirkpatrick v. Blackburn*,<sup>45</sup> Judge Rubin dissented from an opinion upholding a death sentence because the prosecutor's closing argument distracted the jury from its "focus on the aggravating and mitigating circumstances of the crime." Judge Rubin returned to the most fundamental concern of *Furman*: "Because death is so fundamentally different from other kinds of punishment, the Constitution requires, by means of procedural safeguards and judicial vigilance, assurance that the imposition of death is not the product of arbitrariness and caprice."<sup>46</sup> Because the prosecutor undermined the jury's ability "to weigh dispassionately the aggravating and mitigating factors of the case," the death sentence should not stand.<sup>47</sup>

In *King v. Lynaugh*,<sup>48</sup> Judge Rubin founded his respective majority and dissenting opinions on the same principle. King complained that he was entitled to a jury instruction concerning the minimum duration of a life sentence in Texas and to *voir dire* potential jurors on whether they believed that a defendant would be released on early parole if he was not sentenced to death. Judge Rubin wrote a majority opinion denying relief on King's jury instruction claim, but granting relief on the related *voir dire* claim.

Judge Rubin rejected the instruction claim because he was constrained to do so by *O'Bryan v. Estelle*,<sup>49</sup> in which the Fifth Circuit held that a capital defendant is not entitled to an instruction about the availability *vel non* of parole. Judge Rubin noted that *O'Bryan* could be distinguished because it addressed only a due process claim, whereas King raised a distinct constitutional basis for his claim under the Eighth Amendment. Judge Rubin reasoned that under the Eighth Amendment, "alternative sentences and what, in reality, they mean, constitute . . . an integral part of the calculus sentencers use to determine whether a life sentence will suffice to ensure that a particular defendant, convicted of a particular crime, will pose a continued threat to society."<sup>50</sup> None-

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45. 777 F.2d 272, 288 (5th Cir. 1985) (Rubin, J., dissenting).

46. *Id.*

47. *Id.*

48. 828 F.2d 257 (5th Cir. 1987) (*King I*), reversed, 850 F.2d 1055 (5th Cir. 1988) (en banc) (*King II*) (Rubin, J., dissenting).

49. 714 F.2d 365, 388-89 (5th Cir. 1983), cert. denied sub. nom. *O'Bryan v. McKaskle*, 465 U.S. 1013, 104 S. Ct. 1015 (1984).

50. 828 F.2d at 263.

theless, Judge Rubin once again exercised judicial restraint and concluded that he should not base a decision on the Eighth Amendment that would be "fundamentally inconsistent" with the result in *O'Bryan*.<sup>51</sup>

However, because *O'Bryan* precluded an instruction to correct misconceptions about parole, Judge Rubin concluded that a defendant should be entitled to *voir dire* on whether potential jurors held these misconceptions.<sup>52</sup> He recognized that the "widely held misconceptions about the actual effect of imposing a life sentence raise an unacceptable risk that the death penalty may be imposed on some defendants largely on the basis of mistaken notions of parole law."<sup>53</sup>

Less than a year later, Judge Rubin's opinion in *King* was overruled, by the court of appeals *en banc*.<sup>54</sup> The court's *en banc* opinion, as do many opinions denying relief in death penalty appeals, began by vividly recounting the murder. It posited that there was "considerable mischief" in allowing *voir dire* on Texas parole eligibility when "Texas disallows jury consideration of the possibility of parole in its deliberations."<sup>55</sup>

Judge Rubin began his dissenting opinion:

That Leon Rutherford King is a savage criminal has been proved beyond reasonable doubt. Yet even he is entitled to due process when society imposes its sentence on him.<sup>56</sup>

Judge Rubin recounted empirical evidence establishing that most venirepersons believe that a defendant who is sentenced to life will be paroled in seven years and that parole eligibility is a critical factor in deciding whether to impose a death sentence.<sup>57</sup> Indeed, when venirepersons are accurately informed that "life means life," a majority no longer favor the death penalty.<sup>58</sup>

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51. *Id.* at 264.

52. *Id.* at 261.

53. *Id.* at 260. In addressing the importance of eliminating misconceptions about parole from the life or death deliberative process, Judge Rubin recognized that death cases require a "greater degree of scrutiny" than a non-capital case. *King I*, 828 F.2d at 259, quoting *California v. Ramos*, 463 U.S. 992, 998-99, 103 S. Ct. 3446, 3452 (1983). Because capital juries are called upon to make a highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves, there is a "unique opportunity . . . for bias to operate undetected." *Id.*

54. *King v. Lynaugh*, 850 F.2d 1055 (5th Cir. 1988) (*en banc*) (*King II*).

55. *Id.* at 1067.

56. *Id.* at 1061.

57. *Id.* at 1062. Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror's Misconception Concerning Parole and the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211 (1987); William W. Hood, III, Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability of Capital Sentencing*, 75 Va. L. Rev. 1605 (1989).

58. 850 F.2d at 1062.

Judge Rubin found the majority opinion could not be reconciled with Supreme Court opinions promising "extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of . . . mistake."<sup>59</sup> He saw "greater mischief" in allowing a defendant to be sentenced to die because the jury misunderstood what a life sentence meant.<sup>60</sup>

He also reasoned that because Texas makes a defendant's future dangerousness a specific statutory issue in deciding whether to sentence him to die, the relevance of his possible release date as mitigating information "hardly seems disputable."<sup>61</sup> Turning the majority opinion on its head, Judge Rubin wrote, "It is precisely *because* Texas courts refuse to give accurate corrective instructions that *voir dire* about potential jurors understanding of parole becomes necessary."<sup>62</sup>

Judge Rubin's dissent in *King II* shines in the annals of dissenting opinions. His intellectual integrity and allegiance to precedent, including his adherence to *O'Bryan* in *King I*, only make his dissent in *King II* more compelling.<sup>63</sup>

#### V. STAYS OF EXECUTION, FINALITY AND FURTHER PROCESS

Federal habeas has served as an important check against the imposition of the death penalty in violation of the Constitution. Notwithstanding the conservative composition of the federal courts, over forty percent of all death sentences have been overturned in federal habeas proceedings, often due to the most egregious constitutional violations.<sup>64</sup> In response, however, the Rehnquist Supreme Court systematically has erected barriers to habeas review which make counsel's failures to raise claims the primary determinant of which defendants are eligible to vindicate their federal constitutional rights.<sup>65</sup> The Court's decisions have

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59. *Eddings v. Oklahoma*, 455 U.S. 104, 118, 102 S. Ct. 869, 878 (1982) (O'Connor, J., concurring).

60. 850 F.2d at 1067.

61. *Id.* at 1066.

62. *Id.* at 1067 (emphasis in original).

63. In *Byrne v. Butler*, 845 F.2d 501, 519 (5th Cir. 1988) (Rubin, J., concurring), Judge Rubin distinguished his opinion in *King II* and concurred in denying relief to a defendant who complained about jurors' misconceptions about parole eligibility because both a jury's instructions and a counsel's arguments clarified to the jury that "life meant life."

64. Mark Hansen, *Final Justice: Limiting Death Row Appeals*, A.B.A. Journal (March 1992) at 68.

65. See *McKleskey v. Zant*, 111 S. Ct. 1454 (1991), where the Court closed the federal habeas process to constitutional violations not raised by counsel in an initial habeas petition, even though evidence of the violation was concealed by the state. In *Coleman*

placed an extraordinary value on finality and on conserving federal judicial resources.

Judge Rubin was mindful that federal judicial resources were precious. In *Baldwin v. Maggio*,<sup>66</sup> over the dissent of Judge Johnson, he denied a stay of execution that was based on the prospect that the United States Supreme Court would issue opinions helpful to Baldwin in the then undecided cases of *Strickland v. Washington*<sup>67</sup> and *Pulley v. Harris*.<sup>68</sup> Judge Rubin found that Baldwin's case could not be helped even by decisions favorable to him in *Strickland* and *Harris*.<sup>69</sup> He concluded that the principles of *Barefoot v. Estelle*<sup>70</sup> required that the process of federal review must end based only on a calculated improbability of success.

As a co-chair of the American Bar Association Task Force on Death Penalty Habeas Corpus, Judge Rubin oversaw one of the most comprehensive reviews of the capital habeas process. His Task Force made recommendations that would dramatically improve the habeas process. He recognized, even in that context, that the federal review process and the defendant's life must come to an end, often without full opportunity for Supreme Court review:

It is a matter of common occurrence that the district courts in [the Fifth Circuit] are presented with applications for stay of execution—frequently very lengthy and complex—two weeks or less before the execution date, and the case comes to our court on appeal from a denial of a stay and from the denial of habeas relief one or two days before the date set for execution. The judges of our court make a major effort to decide those cases in which we deny relief in time to give the petitioner a chance to present its case to the Supreme Court. Frequently, in order to do so, the members of the panel and the law clerks work on weekends and late into the night [as do district judges]. The problem is not that we have to put in the extra time: it is that

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v. Thompson, 111 S. Ct. 2546 (1991), it also precluded constitutional claims not raised in state court solely due to counsel's neglect in missing a state deadline for filing a notice of appeal. It then held that counsel's neglect in missing the deadline to appeal was not ineffective assistance, because there was no right to an effective attorney in state post-conviction proceedings.

66. 715 F.2d 152 (5th Cir. 1983).

67. 466 U.S. 668 (1983), 104 S. Ct. 2052 (1984).

68. 465 U.S. 37, 104 S. Ct. 871 (1983). In *Strickland*, the state sought a stringent standard for evaluating the effectiveness of counsel in capital cases. In *Harris*, the petitioner argued for a constitutional requirement that a state supreme court provide proportionality review by comparing death sentences in different cases to reduce arbitrariness.

69. The Supreme Court ultimately adopted the state's position in both *Strickland* and *Harris*, and later denied Baldwin's certiorari petition as well.

70. 463 U.S. 880, 103 S. Ct. 3383 (1983).

work done in this manner is necessarily less thorough and that the time allowed for the consideration of issues is less than is desirable. The easy answer, which opponents of the death penalty suggest, is, "the defendant isn't going anywhere. Why not stay the execution and take your time?" However, when the case has already been in court five to ten years or more and there have been two or three previous stays of execution, it seems to be undesirable to grant another stay unless there is some serious legal reason to do so. Moreover, in many instances, the panel is of the opinion that granting a stay "this time," will lead only to another eve-of-execution application on some other ground at a later time.<sup>71</sup>

But in contrast to Supreme Court decisions which allow a client to pay with his life for his counsel's mistakes, Judge Rubin sought to balance the interests of finality with a fundamental concern that the habeas process serve to remedy constitutional violations, particularly in death penalty cases. In *Wilson v. Butler*,<sup>72</sup> Judge Rubin remanded for an evidentiary hearing on Wilson's claim that his appointed counsel was ineffective at sentencing. Wilson had alleged that, although he was brain-damaged, his counsel never investigated his history of mental problems, never had him examined psychologically, and presented no evidence of his mental impairment at sentencing even though it was a statutory mitigating factor.<sup>73</sup>

In *Wilson II*, over Judge Jones' dissent, Judge Rubin expanded the scope of the evidentiary hearing on remand to include the issue of whether counsel was also ineffective at trial for not investigating and presenting an insanity defense. Judge Rubin recognized that Wilson had failed to allege facts sufficient to establish ineffective assistance of counsel at the guilt phase,<sup>74</sup> and that dismissal of his ineffectiveness-at-trial claim was appropriate.<sup>75</sup> However, he found "several factors unique to this case" warranted that the district court consider the issue of ineffective assistance at trial. First, the claims of ineffective assistance at trial and at sentencing were both based on essentially the same evidence; thus consideration of the additional issue would "consume few if any additional resources."<sup>76</sup> Second, "any additional federalism con-

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71. Letter from Judge Rubin (Jan. 16, 1989) at 2-3, quoted in "Rationalizing Federal Habeas Corpus Review of State Court Criminal Convictions in Capital Cases," Background and Issue Papers (ABA Task Force on Death Penalty Habeas Corpus, May 1, 1989).

72. 813 F.2d 664 (*Wilson I*), modified, 825 F.2d 879 (5th Cir. 1987) (*Wilson II*).

73. 813 F.2d at 664.

74. 825 F.2d at 881.

75. Judge Rubin's opinion in *Wilson II* reflects an appreciation for the importance

cern caused by expanding the scope of the inquiry, but not the scope of the evidence, at the hearing would be minimal."<sup>77</sup> Third, the State had "no legitimate interest in preventing a remedy" of any constitutional violation which occurred at trial.<sup>78</sup>

Ultimately, Judge Rubin recognized "[t]he essential purpose of federal habeas corpus is to insure that no petitioner is punished in violation of the Constitution."<sup>79</sup> Particularly "[w]hen, . . . the punishment involved is death, a punishment qualitatively different from all others, fundamental justice demands heightened vigilance in evaluating a petitioner's constitutional claims."<sup>80</sup> Judge Rubin reasoned, "if death is involved, the petitioner should be presented every opportunity possible, consistent with the interest of the State, to present facts relevant to his constitutional claims."

Judge Rubin's decisions in *Wilson II* and *Baldwin* thoughtfully balanced the value of remedying a constitutional injustice in death penalty cases with the state's interest in finality and comity. His careful balancing of interests is in sharp contrast to Supreme Court decisions which tilt the scales in favor of terminating the habeas process and the defendant's life whenever constitutional violations are not raised promptly by counsel—even ineffective counsel.<sup>81</sup>

#### VI. INVALID AGGRAVATING FACTORS UNDER LOUISIANA LAW

Judge Rubin addressed the first of these principles in several cases in which a Louisiana jury found the defendant eligible for the death penalty based on multiple aggravating factors, some but not all of which were later invalidated.<sup>82</sup> His opinions adhered to the constraints of state law and federal precedent with intellectual ferocity.

In *Wilson v. Butler*,<sup>83</sup> the jury found the defendant was qualified for the death penalty based on three independent statutory aggravating factors only one of which was valid.<sup>84</sup> Wilson argued that the jury was

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of the adversarial process, which he also articulated in his dissenting opinion in *Buxton v. Lynaugh*, 879 F.2d 140, 148 (5th Cir.), cert. denied, 110 S. Ct. 3295 (1989). In *Buxton*, a state court judge had denied a claim of ineffective assistance of counsel by accepting one of two conflicting affidavits, without holding an adversarial hearing. Judge Rubin reasoned that the critical factual dispute required an adversarial hearing which is "informed by the judge's observation of the witness' demeanor on direct and cross-examination." *Id.* at 150. In *Buxton*, as in *Wilson*, Judge Rubin found more process appropriate only because the decision-makers who preceded him had not even heard the evidence.

76. 825 F.2d at 882.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. See *supra* note 65.

82. After *Roberts*, Louisiana enacted a new death penalty law. It conditions the death

prejudiced in its deliberations by considering the two invalid aggravating factors.

Judge Rubin found Wilson's claim was foreclosed by the Fifth Circuit's *en banc* decision in *Williams v. Maggio*<sup>85</sup> from which he had dissented. In *Williams*, the court reasoned that the purpose of aggravating factors under Louisiana law was to narrow the group of death eligible defendants; an invalid factor would be immaterial to the jury's life-or-death decision, as long as a valid factor was established. Judge Rubin joined in Judge Randall's dissenting opinion which argued that the Fifth Circuit should certify to the Louisiana Supreme Court the issue of whether an invalid aggravating factor was prejudicial under Louisiana law,<sup>86</sup> just as the United States Supreme Court had certified the parallel question to the Georgia Supreme Court in *Zant v. Stephens*.<sup>87</sup>

In *Wilson I*, Judge Rubin demonstrated his respect for precedent and intellectual honesty. He not only rejected Wilson's claim based on the decision in *Williams* from which he had dissented, but he analyzed Louisiana law on the issue and concluded that the majority opinion in *Williams* was correct. He found Louisiana law did not require a weighing of mitigating and aggravating factors and thus an invalid aggravating factor should not infect the deliberative process.<sup>88</sup>

In *Jones v. Butler*,<sup>89</sup> Judge Rubin was afforded an opportunity to revisit the effect of an invalid aggravating factor under the Louisiana death penalty law in light of the United States Supreme Court's intervening decision in *Johnson v. Mississippi*.<sup>90</sup> In *Johnson*, the Court held that a Mississippi death sentence should be reversed when one of two statutory aggravating factors was invalidated. Judge Rubin's intellectual honesty and his own decision in *Wilson* compelled him to distinguish *Johnson*. He found the Mississippi scheme "requires a jury to weigh mitigating and aggravating circumstances while, as we have noted, *Wilson*

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penalty upon the jury finding "at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommend[ing] that the sentence of death be imposed." La. Code Crim. Proc. art. 905.3.

83. 813 F.2d 664 (*Wilson I*), modified on other grounds, 825 F.2d 879 (5th Cir. 1987), cert. denied, 484 U.S. 1079, 108 S. Ct. 1059 (1988).

84. The three factors were: (1) he committed the murder during an armed robbery; (2) he committed the murder in an especially heinous manner; and (3) he had a significant history of criminal activity. On direct appeal, the Louisiana Supreme Court found there was no evidence that the murder was committed in a heinous manner and that the third aggravating factor was unconstitutional. 813 F.2d at 673.

85. 679 F.2d 381 (5th Cir. 1982).

86. *Id.* at 405.

87. 462 U.S. 862, 103 S. Ct. 2733 (1983); *Williams*, 679 F.2d at 405.

88. 813 F.2d at 674.

89. 864 F.2d 348, 364, modified, 864 F.2d 368, 370-71 (5th Cir. 1988).

90. 486 U.S. 578, 108 S. Ct. 1981 (1988).

held that Louisiana law does not."<sup>91</sup> In a weighing scheme, consideration of an invalid aggravating factor would prejudice the jury; under Louisiana's scheme, in which the invalid aggravating factor is not necessarily part of the weighing process, the prejudice is not as apparent. Ironically, the state law issue, which the Fifth Circuit declined to certify in *Williams* and Judge Rubin analyzed himself in *Wilson*, proved determinative in *Jones*.<sup>92</sup>

## VII. CONCLUSION

Judge Rubin's death penalty opinions encompass a significant number of cases in which he affirmed the denial of relief to the condemned. In many of those cases, his opinion was dictated by Supreme Court or Fifth Circuit precedent, which he followed faithfully. In those cases in which he either granted relief or argued in dissent for doing so, he generally acted to vindicate the constituent elements of the judicial process: an effective counsel, a sentencer who is not biased by misconceptions, and an adversarial process in which the defendant is not mechanically foreclosed by his counsel's mistakes from raising fundamental constitutional claims.

Judge Rubin's death penalty opinions—dissents, concurring, and majority—are a tribute to a great jurist. But the legacy is not one of justice accomplished. As Judge Rubin noted in *Riles*, defendants are routinely sent to their deaths only because their counsel was not competent. As the empirical evidence he recounted in *King II* demonstrates, defendants are sentenced to die because juries believe falsely that otherwise they will be released on parole. As the decisions in *Landry* and *King II* reflect, meritorious claims are not even heard solely because of counsel's mistakes. Indeed, in the only two capital cases in which Judge Rubin effectively granted relief, *Mayo* and *Wilson*, his decisions were based in part upon fortuitous circumstances which surfaced only in motions to reconsider and tilted the judicial balance. Twenty years after *Furman*, arbitrariness in determining who lives and who dies remains at the heart of capital sentencing.

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91. 864 F.2d at 371.

92. Judge Rubin also addressed in *Jones* the logical extension of his interpretation of Louisiana law: whether the Louisiana law was unconstitutional because it did not provide for some weighing of mitigating and aggravating circumstances. Judge Rubin upheld the law because, under the minimal constitutional principles recognized by the Supreme Court, a state is not "required to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." *Id.* at 367-68. Significantly, the underlying basis of Judge Rubin's decision in *Jones* was later confirmed by the United States Supreme Court in *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S. Ct. 1078 (1990).

When a jurist of Judge Rubin's intellectual integrity is so often constrained by precedent and relegated to dissent, there is cause to re-examine the precedents with which he so ably and fairly struggled: *Strickland* and the inadequate counsel it tolerates; *King II* and the misconceptions about parole which it sanctions; the procedural default doctrine and its arbitrary barriers to review of constitutional violations. Notwithstanding his recognized brilliance as a jurist, Judge Rubin was never reluctant to reverse his own errors nor closed to the possibility that he could be wrong. Only when the courts re-examine the role of counsel and of the habeas process in death penalty cases, with the same spirit of fairness and integrity which Judge Rubin exemplified, will Judge Rubin's legacy be accorded its well-deserved place in the history of death penalty jurisprudence.